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Klass Corp (M) Sdn Bhd v MKRS Management Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-472–11 OF 2017
MOHD NAZLAN J
12 FEBRUARY 2018

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Civil Procedure — Injunction — Fortuna injunction — Sessions court allowed defendant's claim against plaintiff — Plaintiff filed appeal — Defendant served notice of statutory demand under ss 465(1)(e), (h) and 466(1)(a) of the Companies Act 2016 — Whether plaintiff should applied for Fortuna injunction instead of Erinford injunction — Whether debt amount as demanded by defendant in winding up notice could in law be considered to be bona fide disputed on substantial grounds

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The defendant had sued the plaintiff for an outstanding amount based on breach of contract by the plaintiff. The sessions court had allowed the defendant's claim and subsequently, the plaintiff had filed an appeal. Pending the appeal, the defendant had served a notice of statutory demand issued under ss 465(1)(e), (h) and 466(1)(a) of the Companies Act 2016 ('the CA') and demanded payment of the total sum of RM1,117,804.88, being the total sum due under the judgment debt within the requisite 21 days. The plaintiff then filed the instant injunction application by way of originating summons, seeking to restrain the defendant from presenting a winding up petition pending the disposal of the plaintiff's appeal against the said decision of the sessions court. The plaintiff described its injunction application being in the nature of an Erinford injunction. The plaintiff submitted that that the presentation of a winding up petition would result in negative repercussions to the plaintiff company, the project it was working on, and on public interest. The issue arose was, inter alia, whether the debt amount as demanded by the defendant in the winding up notice could in law be considered to be bona fide disputed on substantial grounds.

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Held, dismissing the plaintiff's application:

(1) A Fortuna injunction was well established as the legal process to be invoked in the context of restraining the presentation of a winding up petition, like presently whereas the jurisdiction to grant an Erinford arose after the dismissal of the initial application for injunction, pending disposal of the appeal against the dismissal. This was quite unlike the present case, where the plaintiff applied for an Erinford at first instance in the absence of any dismissal of an earlier injunction application, for there was no initial application to start with. Instead of applying for an

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Erinford, the plaintiff should first pursue a Fortuna injunction application. Its application on the basis of the Erinford was therefore defective (see paras 79 & 81).

(2) The overriding question of whether the debt was disputed, arising from the test of whether the petition would be bound to fail, in the present case was readily answered in an unequivocal 'No', on both counts. There was the judgment debt which meant there was no bona fide dispute, and there was no stay, which in effect reinforced the absence of a bona fide dispute. The existence of a bona fide disputes was affected by the presence of a stay. The rule that a stay did not prevent a winding up was irrelevant and out of context in the instant case and was thus entirely unmeritorious. In the instant case, quite apart from the judgment debt, the plaintiff had not shown any evidence to demonstrate the existence of a bona fide dispute. No Fortuna injunction could be granted on this basis (see paras 34 & 48).

(3) The position of the defendant in pursuit of its statutory right as a judgment creditor to seek the winding up of the plaintiff could not be validly defeated by arguments concerning the existence of the plaintiff's contractual obligations vis a vis the school project as claimed by the plaintiff. In any event, the plaintiff's allegations were not substantiated and more speculative than anything else. No evidence had been furnished to show why or how a mere presentation of a winding up petition would jeopardise its on-going project work. In order to avoid the predicament and risks of irreparable damage that could be brought about by the petition as contended by the plaintiff, the course of action that ought to be taken was to pay up and settle the judgment debt (see paras 39–41).

(4) Even if a debtor company could demonstrate ready availability of more than sufficient cash-flow and liquid assets as well as funds capable of paying its debts whenever they fall due, its refusal or neglect to actually make the payment available to the creditor, for any reason other than that the debt was bona fide disputed on substantial grounds or other valid bases, must still meant that the company failed to rebut the presumption of its insolvency. This would tantamount to the company not being commercially solvent and thus being unable to pay its debts for purposes of ss 465 (1)(e) and 466 (1)(a) of the CA. In the instant case, the plaintiff did not even seek to demonstrate that it was in any event commercially solvent (see paras 59–60 & 64).

(5) It was apparent that the plaintiff was seeking for an injunction, Fortuna or Erinford, to operate, for all intents and purposes, as a stay of execution of the judgment debt which the plaintiff had even failed to apply. To such extent, the nature of the relief sought by the plaintiff was clearly intended to prevent the execution of the judgment debt pending the disposal of its appeal against the judgment debt. This was bordering on an abuse of court process because the plaintiff should rightfully have applied to the

sessions court to stay the execution of the judgment debt pending the disposal of the appeal. Instead the plaintiff sought to achieve the same result by applying, erroneously, for a Fortuna injunction. This was thus a stay application by the backdoor, pure and simple. And it was not acceptable and could not be countenanced by the court (see paras 82–83).

[Bahasa Malaysia summary

Defendan telah menyaman plaintif untuk jumlah yang belum dibayar atas kemungkiran kontrak oleh plaintif. Mahkamah sesyen telah membenarkan tuntutan defendan dan kemudiannya, plaintif telah memfailkan rayuan. Sementara menunggu rayuan, defendan telah menyerahkan notis tuntutan statutory dikeluarkan di bawah ss 465(1)(e), (h) dan 466(1)(a) Akta Syarikat 2016 ('AS') dan menuntut bayaran jumlah keseluruhan sebanyak RM1,117,804.88, sebagai jumlah keseluruhan yang perlu dibayar di bawah hutang penghakiman dalam masa 21 hari yang diperlukan. Plaintif kemudiannya memfailkan permohonan injunksi ini melalui saman pemula, memohon untuk menghalang defendan daripada mengemukakan petisyen penggulungan sementara menunggu pendengaran rayuan plaintif terhadap keputusan mahkamah sesyen tersebut. Plaintif menyatakan bahawa permohonan injunksinya bersifat injunksi Erinford. Plaintif berhujah bahawa pengemukakann petisyen penggulungan akan mengakibatkan kesan negatif kepada syarikat plaintif, projek yang sedang dijalankan, dan ats kepentingan awam. Isu yang berbangkit adalah, antara lain, sama ada jumlah hutang seperti yang dituntut oleh defendan dalam notis penggulungan boleh dari segi undang-undang dipertimbangkan sebagai bona fide dipertikaikan atas alasan-alasan substansial.

Diputuskan, menolak permohonan plaintif:

(1) Injunksi Fortuna terbukti sebagai proses undang-undang untuk dibangkitkan dalam konteks menghalang pengemukaan petisyen penggulungan, seperti permohonan ini manakala bidang kuasa untuk memberikan injunksi Erinford berbangkit selepas penolakan permohonan permulaan untuk injunksi, sementara menunggu pendengaran rayuan terhadap penolakan tersebut. Ini tidak seperti dalam kes ini, di mana plaintif memohon untuk Erinford pada mulanya dalam ketiadaan apa-apa penolakan terhadap permohonan injunksi terdahulu, kerana tidak terdapat permohonan awal. Plaintif sepatutnya memohon permohonan injunksi Fortuna dahulu dan bukan memohon untuk Erinford. Permohonannya atas dasar Erinford oleh itu adalah cacat (lihat perenggan 79 & 81).

(2) Soalan utama sama ada hutang adalah dipertikaikan, berbangkit daripada ujian sama ada petisyen akan gagal, dalam kes ini mudah dijawab dengan jelas 'No', atas kedua-dua perkara. Terdapat hutang

penghakiman yang bermaksud tidak terdapat pertikaian bona fide, dan tidak terdapat penangguhan, yang mana pada hakikatnya memperkukuhkan ketiadaan pertikaian bona fide. Kewujudan pertikaian bona fide adalah terjejas dengan kehadiran penangguhan. Peraturan bahawa penangguhan tidak menghalang penggulungan adalah tidak relevan dan di luar konteks dalam kes ini dan oleh itu benar-benar tidak bermerit. Dalam kes ini, selain daripada hutang penghakiman, plaintif tidak menunjukkan apa-apa keterangan untuk menunjukkan kewujudan pertikaian bona fide. Tiada injunksi Fortuna boleh diberikan atas dasar ini (lihat perenggan 34 & 48).

(3) Kedudukan defendan dalam memburu hak statutorinya sebagai penghutang penghakiman untuk memohon penggulungan terhadap plaintif tidak boleh dipatahkan secara sah dengan hujahan-hujahan berkaitan tanggungjawab kontraktual plaintif vis a vis projek sekolah seperti yang dituntut oleh plaintif. Walau bagaimanapun, tuduhan-tuduhan plaintif tidak berasas dan hanya spekulatif. Tiada keterangan telah dikemukakan untuk menunjukkan mengapa atau bagaimana pengemukaan petisyen penggulungan semata-mata akan menjejaskan kerja projek yang sedang berjalan. Untuk mengelak masalah dan risiko ganti rugi yang tidak dapat ditebus yang boleh disebabkan oleh petisyen tersebut seperti yang dihujahkan oleh plaintif, perjalanan tindakan yang perlu diambil adalah untuk membayar dan menyelesaikan hutang penghakiman (lihat perenggan 39–41).

(4) Walaupun penghutang syarikat boleh menunjukkan terdapat lebih daripada aliran tunai yang mencukupi dan aset cair dan juga dana yang dapat membayar hutangnya apabila tiba masanya, keengganannya atau kecuaiannya untuk sebenarnya membuat bayaran kepada pemiutang, untuk apa-apa sebab selain daripada bahawa hutang adalah bona fide dipertikaikan atas alasan-alasan substansial atau asas sah yang lain, mesti masih bermaksud bahawa syarikat gagal untuk mematahkan anggapan insolvensinya. Ini akan menyebabkan syarikat tidak solven secara komersial dan oleh itu tidak dapat membayar hutangnya bagi tujuan ss 465(1)(e) dan 466(1)(a) AS. Dalam kes ini, plaintif tidak langsung memohon untuk menunjukkan bahawa ia walau bagaimanapun solven secara komersial (lihat perenggan 59–60 & 64).

(5) Adalah jelas bahawa plaintif adalah memohon untuk injunksi Fortuna atau Erinford, untuk beroperasi, bagi kesemua niat dan tujuan, sebagai penangguhan pelaksanaan hutang penghakiman yang mana plaintif juga gagal untuk memohon. Setakat sedemikian, sifat relif yang dipohon oleh plaintif adalah jelas berniat untuk menghalang pelaksanaan hutang sementara menunggu pendengaran rayuannya terhadap hutang penghakiman. Ini bersempadan dengan penyalahgunaan proses mahkamah kerana plaintif sepatutnya memohon kepada mahkamah

sesyen untuk menangguh pelaksanaan hutang penghakiman sementara menunggu pendengaran rayuan. Sebaliknya plaintif memohon untuk mencapai keputusan yang sama dengan memohon, secara salah, untuk injunksi Fortuna. Ini oleh itu adalah permohonan penangguhan melalui pintu belakang, semata-mata. Dan ia tidak boleh diterima dan tidak boleh dipertimbangkan oleh mahkamah (lihat perenggan 82–83).]

Notes

For cases on Fortuna injunction, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4196–4200.

Cases referred to

Aeon Big (M) Sdn Bhd v SSM Management Sdn Bhd [2017] MLJU 1824; [2017] 8 AMR 732, HC (refd)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (not folld)

BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd [2001] 1 MLJ 356, HC (refd)

Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd [2016] MLJU 1878; [2016] 10 CLJ 247, HC (refd)

Celcom (Malaysia) Bhd v Inmiss Communication Sdn Bhd [2003] 3 MLJ 178, HC (refd)

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447; [1988] 1 CLJ Rep 5, SC (refd)

Cornhill Insurance Plc v Improvement Services Ltd and others [1986] 1 WLR 114, Ch D (refd)

Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd [2016] MLJU 352, HC (refd)

ELF Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 (refd)

Erinford Properties Ltd v Cheshire County Council [1974] 2 All ER 448, Ch D (refd)

Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83, SC (refd)

Great Britain Mutual Life Assurance Society, In Re (1880) 16 Ch D 246, CA (refd)

Imperial Hydropathic Hotel Company, Blackpool v Hampson (1882) 23 Ch D 1, CA (refd)

KSM Insuran Bhd v Ong Ah Ba & Anor [1986] 1 MLJ 237 (refd)

Kris Heavy Engineering & Construction Sdn Bhd v Lewis & Co (Advocates & Solicitors) [2017] MLJU 906; [2017] 5 AMR 866, HC (refd)

Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 6 MLJ 817, CA (refd)

Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)

Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980] 2 MLJ 53, PC (refd)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187; [2001] 3 CLJ 248, CA (refd)
Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316, CA (refd)
Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95, SC (refd)
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 CLJ 947, CA (refd)
Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd) [2006] 2 MLJ 602, CA (refd)
Rotating Offshore Solutions Pte Ltd v TH Heavy Engineering Bhd [2017] MLJU 904, HC (not folld)
Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd [1985] 1 MLJ 84 (refd)
Siow Moon Yeow v Panglobal Berhad & Ors [2000] MLJU 184, HC (refd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313; [1992] 1 CLJ 637, SC (refd)
Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals [2008] 2 MLJ 147, FC (refd)
System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd [1999] MLJU 55; [1999] 1 AMR 1187, HC (refd)
Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd [2007] 4 MLJ 355, CA (refd)
WWTAI Finance Ltd v IES Energy Holdings Sdn Bhd [2016] MLJU 1591, HC (refd)
Westform Far East Sdn Bhd v Connaught Heights Sdn Bhd and other appeals [2010] 3 MLJ 459, CA (refd)
Zalam Corporation Sdn Bhd v Dolomite Readymixed Concrete Sdn Bhd [2011] MLJU 1552; [2011] 9 CLJ 705, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 218
Companies Act 2016 ss 465, 465(1)(e), (1)(h), 466, 466(1)(a), (1)(b), (1)(c), 486(1)(a), 492, 493, Twelfth Schedule, Part 1
Companies Winding-up Rules 1972

G Nanda Goban (Goban & Co) for the plaintiff.
G Rajasingam (Nik Azila Shuhada with him) (Shearn Delamore & Co) for the defendant.

Mohd Nazlan J:

INTRODUCTION

[1] This is an application for an injunction filed by the plaintiff to restrain the defendant from presenting a winding up petition under s 465 of the Companies Act 2016 against the plaintiff. At the conclusion of the hearing, I refused the application and highlighted the main reasons for the dismissal. These are the full reasons for my decision, which reiterates the principles governing applications of Fortuna injunctions under the new Companies Act 2016.

KEY BACKGROUND FACTS

[2] The plaintiff is involved in the construction business, and is the subcontractor for a certain work package in respect of the project for the mass rapid transit ('MRT') in the Klang Valley. The defendant is in the business of supplying products and services related to scaffolding, manpower and safety consultancies in the construction and engineering sectors.

[3] The parties had entered into a contractual relationship that subsequently turned litigious, and which saw the defendant instituting a claim against the plaintiff on 28 April 2015, for what the former pleaded was a breach of contract, and thus sued for an alleged outstanding amounts from the plaintiff (Suit No B52C-6–04 of 2015).

[4] The plaintiff contested the claim, and a trial then ensued, which took place for 27 days, over a period of two years, where 14 witnesses testified. On 10 October 2017, the Kuala Lumpur Sessions Court allowed the defendant's claim against the plaintiff and ordered that the plaintiff must pay the defendant the following:

(i) principal amount of RM715,381.79;

(ii) contractual interest on overdue sum up to 9 October 2017 amounting to RM340,248.49;

(iii) disbursements totalling RM19,670.85;

(iv) costs in the sum of RM30,000; and

(v) post judgment interest on (i) and (ii) above at the rate of 5%pa from 10 October 2017 till full settlement (collectively, 'the judgment debt').

[5] Dissatisfied, the plaintiff on 12 October 2017 filed a notice of appeal to the High Court (Civil Appeal No WA-12BC-22–10 of 2017) against the decision of the sessions court.

[6] The defendant however, on 19 October 2017 served a notice of statutory demand issued under ss 465(1)(e), (h) and 466(1)(a) of the Companies Act 2016 ('the CA') and demanded payment of the total sum of RM1,117.804.88, being the total sum due under the judgment debt within the requisite 21 days.

[7] The plaintiff then filed the instant injunction application by way of originating summons, seeking to restrain the defendant from presenting a winding up petition pending the disposal of the plaintiff's appeal against the said decision of the sessions court. The plaintiff however at least initially described its injunction application being in the nature of an Erinford injunction.

[8] Hence, the instant proceeding before me.

ESSENCE OF CONTENTIONS OF PARTIES

[9] The plaintiff anchors its application on a number of grounds commonly proffered by applicants for injunctions intended to prevent the filing of winding up petitions. First, as mentioned above, the plaintiff asserted that this is an Erinford type injunction, and that Malaysian courts recognise and have allowed this type of injunction. The plaintiff refers to a number of authorities, which it says are in support of its application, such as the Federal Court decision in *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147, as well as High Court cases of *Siow Moon Yeow v Panglobal Berhad & Ors* [2000] MLJU 184, *Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd* [2016] MLJU 352 and *Celcom (Malaysia) Bhd v Inmiss Communication Sdn Bhd* [2003] 3 MLJ 178.

[10] Secondly, the plaintiff argues that there is not yet a final judgment on the defendant's disputed claim because the matter is presently pending appeal.

[11] The plaintiff further submits that there are very serious appealable issues to be considered by the High Court in the appeal against the decision of the sessions court.

[12] The plaintiff further argues that it is clear that the defendant is seeking to enforce the judgment of the sessions court through winding up proceedings, and this pursuit by the defendant is an abuse of process as it is designed to force the plaintiff to pay the judgment debt.

[13] If the defendant is not restrained by an injunction pending the disposal of the appeal, the plaintiff contends that defendant's winding up action against the plaintiff would cause severe irreparable damage to the plaintiff company,

rendering any possible decision in favour of the plaintiff in the appeal to be nugatory. Advertising of the petition in newspapers would be picked by CTOS and other similar agencies leading to the plaintiff to be black-listed and its bank accounts to be frozen by financial institutions.

[14] Furthermore, the presentation of the petition would result in exceptional hardship on the plaintiff, particularly on its ability to fulfil its contractual and social obligations under a school building project for the Ministry of Education as the freezing of its bank accounts would mean that withdrawals are prohibited. This would in turn mean that any payments made by the Government of Malaysia under the school building contract could not be utilised by the plaintiff to pay the plaintiff's suppliers and workers involved in the project. The school building project itself would be stalled indefinitely as a consequence.

[15] The plaintiff argues that it is ready and willing to pay the monthly interest on the total sum demanded by the defendant in the statutory notice until the final disposal of the appeal; and in fact the plaintiff had delivered to defendant a cheque for the sum RM4,388.30 as payment for the interest for the first month. However the defendant has not only rejected the cheque made out for the payment of the first month's interest but also declined the cheque be made the payment of costs of one interlocutory matter at the sessions court and another for an interlocutory appeal at the High Court. The plaintiff thus maintains that the rejection of payment of costs awarded to the defendant shows that the defendant's stand lacks bona fide.

[16] The plaintiff also maintains that the defendant's argument that this application is an abuse of process of court because the plaintiff should rightfully have applied for a stay of execution at the sessions court before making this application for an injunction is flawed for first, there is no legal basis or case authority for this argument, citing the case of *Rotating Offshore Solutions Pte Ltd v TH Heavy Engineering Bhd* [2017] MLJU 904 in support; secondly, an applicant is not required under the law to first apply for a stay of execution before making an application for an injunction as done here; thirdly, the absence of a stay of execution does not prevent this court from granting the injunction applied for; and fourthly, the fact that there is no stay of execution means that the defendant is at liberty to commence other forms of execution against the plaintiff.

[17] The defendant resists this injunction application which it asserts is entirely misconceived.

[18] These arguments of the plaintiff will be examined next in this judgment, taking into account the stance taken by the defendant, and the affidavit evidence made available before me. But first, a brief reference to the governing law.

THE LAW ON INJUNCTION RESTRAINING THE PRESENTATION OF WINDING UP PETITION

[19] An injunction to prevent the filing of a winding up petition is known as a Fortuna, not Erinford injunction. The jurisprudential basis of the applicability of Fortuna injunctions in this country in part may be traced to the eponymous Australian case of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia* [1978] VR 83, a decision of the Supreme Court of Victoria. It established that an injunction would only be granted in circumstances where to allow the petition would be an abuse of process as the petition has no chance of success. And that the plaintiff would have to show that the petition, if presented, would likely be dismissed.

[20] To do this, the court would have to consider whether there is a bona fide dispute of debt based on substantial grounds. The same principles were adopted and applied by our Court of Appeal in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316, where Gopal Sri Ram JCA (as he then was) summarised the position in the following manner:

> (3) The kind injunction by which an intended winding up petition is sought to be restrained is known as Fortuna injunction. The phrase takes its name from *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* where the juridical basis for the relief was first explained. *Fortuna Holdings* made it clear that the courts have established a principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. It was also clear that two distinct branches emanate from the principle — of which the first applies in cases where the presentation of the petition may produce irreparable damage to the company and where the proposed petition has no chance of success, and the second in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

[21] The Court of Appeal again had the occasion to consider the application of a Fortuna injunction, where in the case of *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947, Ramly Ali JCA (as he then was) provided the following explanation:

> [25] An application for an injunction to restrain an intended winding-up petition against a company is known as a 'Fortuna Injunction', taking its name from the case of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83.

In that case the court laid down the basis on which a court acts to restrain the presentation of a winding-up petition and the two principles that guide courts in the grant of an injunction to that effect (see also: *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 CLJ 295 (CA)).

[26] The first principle laid down in that case is that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. In order to succeed in getting injunction under this principle, the applicant must satisfy both limbs of the principle ie:

(i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and

(ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.

(See *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v Amanda* [1964] 1 Ch 240; [1963] 2 All ER 940; and *Bryanston Finance Ltd v De Vries (No 2)* [1976] 2 WLR 41; [1976] 1 All ER 25).

[27] This principle is not applicable to the present case. The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (the appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case, cannot be granted by court under this principle.

[28] The second principle established in the *Fortuna* case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

[29] This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it will cause irreparable damage to the company, if presented. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle.

[22] The Court of Appeal in *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355 further explained that the court exercises its inherent jurisdiction when issuing such an injunction to restrain the presentation of a winding up in order to prevent an abuse of process. The test when granting the injunction is whether there is bona fide dispute of the debt. Gopal Sri Ram JCA (as he then was) held:

[8] When deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds (see *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241). It is not enough that there is a serious question to be tried. In other

words, this is one of those cases to which the general test laid down in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 does not apply. (Emphasis added)

[23] As such, in light of the foregoing authorities and other relevant judicial pronouncements, it should by now be considered settled law that the courts may grant a Fortuna injunction to prevent the presentation of a winding up petition on the basis of either the petition has no chance of success and might produce irreparable damage to the company, or that an assertion of a disputed claim is made in the petition by way of a procedure that might produce irreparable damage. The courts must be satisfied that the plaintiff has established a prima facie case of an abuse of process by the presentation of a petition particularly on the basis of a disputed debt; and the serious question to be tried test established in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 is not applicable.

[24] I should add that case law authorities on Fortuna injunction in this country are largely premised on the winding up provisions in the former s 218 of the Companies Act 1965. The Companies Act 1965 has since been replaced by the Companies Act 2016. However, these statutory provisions are repeated and drafted in almost virtually identical fashion in ss 465 and 466 of the new Companies Act 2016. As such, the jurisprudence and authorities, a number of which will be highlighted herein, would continue to be of direct relevance and be applicable to like effect, vis a vis the situations which are subject to these corresponding provisions in the Companies Act 2016.

EVALUATION AND FINDINGS OF THIS COURT

Judgment debt, without a stay raises no bona fide dispute

[25] The overarching issue is whether in light of *Fortuna Holdings* and other, especially local case law authorities, the intended petition by the defendant, given the service of the winding up notice in the statutory demand, is bound to fail. And that then turns on the primary and most commonly important question for determination in virtually all Fortuna injunction applications — which is whether the debt amount as demanded by the defendant in the winding up notice can in law be considered to be bona fide disputed on substantial grounds.

[26] In the first place, it is settled law that a judgment debt is not considered as capable of having the status of being disputed. Whatever dispute that existed has been resolved by the judgment of the court. This much is clear from the decision of the Court of Appeal in the case of *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 referred to earlier, which is worthy of repetition, as follows:

A [27] This principle is not applicable to the present case. *The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (the appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed.* Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case, cannot be
B granted by court under this principle.

[27] This is the position because the court has already made the determination, in the form of a valid and enforceable judgment, which confirms the existence of the debt. It can thus no longer be disputed, unless the
C judgment is otherwise stayed or set aside. Again, *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 states:

[29] This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not
D consequence whether or not it will cause irreparable damage to the company, if presented. *A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point.* Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle. (Emphasis added.)

E

[28] In the instant case before me however, the status of the judgment debt is one that is presently valid, binding and enforceable. There is no stay against the judgment of the sessions court. The plaintiff did not even apply for a stay.

F **[29]** The plaintiff advanced the argument that a stay would be unnecessary in this case because a stay of execution, if granted, would not have the effect of preventing the pursuit of a winding up proceedings against the plaintiff since winding up is under the law not a form of execution in any event.

G **[30]** It is correct, for it is already trite, that a stay cannot operate to restrain the execution of the judgment debt should the mode of enforcement is by way of a winding up action. Equally significantly, it is for this same basis — in that a winding up is not a form of an execution of judgment — such that, a creditor is not required to obtain judgment before serving a statutory demand for the
H winding up of a debtor company. A judgment is thus not a prerequisite for the institution of a winding up proceedings (see the Court of Appeal decisions in *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817 and in *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187; [2001] 3 CLJ 248).

I **[31]** The plaintiff further seeks to fortify its position that a stay is irrelevant in the context of its present application by citing the following passage of my decision in *Rotating Offshore Solutions Pte Ltd v TH Heavy Engineering Bhd* [2017] MLJU 904:

> [24] It is however well established that a stay of execution of the judgment, if granted, cannot in law prevent the presentation of a winding-up petition. This is because winding-up proceedings are not execution proceedings that are caught within the ambit of a stay order. A winding-up petition is not 'execution' in the context of O 46 r 1, for it is not based on any judgment of the Court (see the decisions of the Court of Appeal in *Juara Aspirasi (M) Sdn Bhd v Tan Soon Ping* [2012] 1 MLJ 50 and also *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187; [2001] 3 CLJ 248).

[32] The contention of the plaintiff is plainly misconceived. The above passage does not in any fashion advance the case of the plaintiff. The inability of a stay order to restrain a winding up petition is not the true issue in an application for a Fortuna injunction. Instead the reason why a stay is of relevance in an application for Fortuna injunction is the effect it has on the question of whether the judgment debt (if there is one) is bona fide disputed. For the stay operates to suspend a judgment of the court and deprives it from being one that is not bona fide disputed. In other words, with a stay in place, the argument that there is no bona fide dispute over a debt demanded in a winding up notice given the judgment debt, like the case presently, would potentially be unsustainable.

[33] In *Rotating Offshore Solutions Pte Ltd v TH Heavy Engineering Bhd* [2017] MLJU 904, the applicant sought for a stay of execution which I considered to be a precursor to a possible Fortuna injunction. In fact, the plaintiff in the instant case omitted to refer to the following passage from my judgment in that case:

> [60] The affidavits of the defendant have also requested for a stay to be granted so that the debt owed by the defendant may be rendered disputable; and for consequential orders for an injunction to restrain the presentation of a winding-up petition by the plaintiff. As I have indicated earlier, the defendant is therefore for all intents and purposes, attempting to cloak an application to achieve the restraint of the presentation of a winding-up petition, properly a Fortuna injunction, in the instant application for stay of execution of judgment under O 45 r 11. At the hearing, however, counsel for the defendant agreed that a stay would not prevent the presentation of a winding-up petition but argued, quite correctly, that a stay would assist in a separate and subsequent application for a Fortuna injunction, as it could render the relevant debt bona fide disputed.

[34] The overriding question of whether the debt is disputed, arising from the test of whether the petition would be bound to fail, in this case is readily answered in an unequivocal 'No', on both counts. There is the judgment debt which means there is no bona fide dispute, and there is no stay, which in effect reinforces the absence of a bona fide dispute. The existence of a bona fide disputes is affected by the presence of a stay. The rule that a stay does not prevent a winding up is irrelevant and out of context in the instant case, and is

thus entirely unmeritorious. Indeed, apart from this argument of little substance, no reason was proffered to clarify why the plaintiff refrained from seeking a stay of execution of the judgment debt.

Irreparable damage irrelevant

[35] The assertion which suggests that the presentation of a winding up petition would result in negative repercussions to the plaintiff company, the project it was working on, and on public interest is of no valid basis. As stated earlier it has been established by the Court of Appeal in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 that if the intended petition is not bound to fail and instead has a good chance of success, then whether or not the petition will cause irreparable damage is immaterial and of no consequence.

[36] This has common sense and justice written all over it. Otherwise a debtor company can easily escape liability and the winding up proceedings by showing evidence that should a petition be presented against it, irreparable and untold damage would ensue. The law would be failing in its duty to dispense justice if parties were presented with this avenue which does nothing but promote the moral hazard (where parties alter their behaviour when their risk-taking is borne by others) especially when the inability to pay debt is a clear ground for a winding up of a company under s 465(1)(e).

[37] Further, in *WWTAI Finance Ltd v IES Energy Holdings Sdn Bhd* [2016] MLJU 1591 I reiterated the right of the creditor to present a winding up petition, thus:

> [62] It is worthy of emphasis that prima facie a creditor who is not paid has a right to file a petition for a winding up order (see the Supreme Court decision in *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95). This is a statutory right. Upon the expiration of the 21-day period as set out in the s 218 Notice and the judgment debt remains unpaid, the debt becomes 'due and payable' and the respondent is deemed to be unable to pay its debts. Consequently, the petitioner succeeds in acquiring the status of a 'creditor' for the purposes of winding-up proceedings pursuant to s 218(1)(e) and (i) of the CA.

[38] For it has been established much earlier, for instance by the Court of Appeal in *Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)* [2006] 2 MLJ 602 thus:

> [3] ... A demand on a company under s 218(2)(a) may be made by 'a creditor ... to whom the company is indebted in a sum exceeding five hundred ringgit then due'. A judgment for a sum establishes the debt, which then becomes due to the person to whom it owed, who then becomes the creditor.

[39] The position of the defendant in this context, in pursuit of its statutory right as a judgment creditor to seek the winding up of the plaintiff cannot be validly defeated by arguments concerning the existence of the plaintiff's contractual obligations vis a vis the school project as claimed by the plaintiff.

[40] In any event, I cannot but also agree with the submission of the defendant that the plaintiff's allegations are not substantiated and more speculative than anything else. No evidence has been furnished to show why or how a mere presentation of a winding up petition will jeopardise its on-going project work. It is not even clear that a presentation of a petition would constitute an event of default in any of the plaintiff's banking relationships or in the contract with the Ministry of Education, much less what the consequences of such a default would be.

[41] In other words, in order to avoid the predicament and risks of irreparable damage that could be brought about by the petition as contended by the plaintiff, the course of action that ought to be taken is to pay up and settle the judgment debt. In *Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd* [2016] MLJU 1878; [2016] 10 CLJ 247, I observed:

> However, in *Pacific & Orient Insurance*, the Court of Appeal was clear in stating that the question of whether there was irreparable damage was wholly irrelevant when there is a judgment debt, as a petition would thus be bound to fail. Any fears of damage should be avoided by settling the judgment debt (see the Court of Appeal decision in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380).

[42] Nor has the plaintiff offered any clarification as to why the plaintiff is averse to paying the judgment debt which is a valid judgment as between the parties.

[43] Given the statutory right of the defendant to pursue a winding up petition, neither can the plaintiff seek to demand that the former accept the proposal by the latter to pay anything less that the amount specified in the statutory demand. In the instant case, the defendant's refusal to accept is entirely within its rights, more so since the plaintiff is offering to pay the amount of slightly less than a mere RM5,000 when the debt in the notice is more than RM1m.

[44] It is similarly untenable for the plaintiff to argue that since it has offered its undertaking on damages, an injunction ought to be granted. It is plainly erroneous. This is because, as stated earlier, considerations for the usual interlocutory but non-Fortuna injunction applications such as the existence of serious questions to be tried, the balance of convenience and justice and

undertaking as to damages are, as I mentioned earlier in this judgment, of no relevance to an application for a Fortuna injunction.

[45] In another case involving an application for a Fortuna injunction of *Kris Heavy Engineering & Construction Sdn Bhd v Lewis & Co (Advocates & Solicitors)* [2017] MLJU 906; [2017] 5 AMR 866, I held as follows:

> [23] Thus, in light of the foregoing authorities, it is settled law that the courts may grant a Fortuna injunction to prevent the presentation of a winding up petition on the basis of either the petition has no chance of success and might produce irreparable damage to the company, or that an assertion of a disputed claim is made in the petition by way of a procedure that might produce irreparable damage. The courts must be satisfied that the plaintiff has established a prima facie case of an abuse of process by the presentation of a petition particularly on the basis of a disputed debt; and the serious question to be tried test established in *American Cynamid Co (No 1) v Ethicon Ltd* [1975] 1 All ER 504 is not applicable.

A debt must be bona fide truly disputed on substantial grounds

[46] I am not unmindful of the truism that a bona fide dispute does not automatically arise whenever there are opposing assertions. The issue of whether or not there is a bona fide dispute entirely depends on evidence (see *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447; [1988] 1 CLJ Rep 5). It has also been said albeit not in identical context that in order to oppose a winding up petition, the respondent company must be able to raise a bona fide dispute in both a subjective and objective sense, and that it must be honestly believed to exist and must be based on substantial or reasonable grounds (see *BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd* [2001] 1 MLJ 356).

[47] As such, in challenging the debt, the court ought to be satisfied that there is something that should be tried, either before the court itself, or in an action, or by some other proceeding. The Supreme Court in *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 held that the debt must be disputed on substantial grounds, and cited with approval the following part of the judgment of Jessel MR *In Re Great Britain Mutual Life Assurance Society* (1880) 16 Ch D 246:

> ... in my opinion it is not sufficient for the respondents, upon a petition of this kind, to say 'we dispute the claim'. They must bring forward a prima facie case which satisfies the court that there is something which ought to be tried, either before the court itself, or in an action, or by some other proceeding.

[48] In the instant case, quite apart from the judgment debt, the plaintiff has not shown any evidence to demonstrate the existence of a bona fide dispute. No Fortuna injunction can be granted on this basis.

Neglect to pay cannot justify Fortuna injunction notwithstanding commercial solvency unless debt bona fide disputed

[49] Whilst not directly determinative of the key issue in the instant case, I think it is appropriate that I discuss the question of refusal or neglect to pay in insolvency laws, in particular on its nexus to solvency.

[50] It is plain that s 465(1)(e) refers to the winding up ground of 'the company is unable to pay its debts'. Section 466(1)(a) contains the statutory presumption of inability to pay debts and further elaborates on situations where a company is deemed to be unable to pay its debts; first, where the company neglects to pay within 21 days after service of a demand under s 466(1)(a); secondly, where the execution process post-judgment is returned unsatisfied under s 466(1)(b); and thirdly, where the court determines the company to be unable to pay its debts taking into account the contingent and prospective liabilities of the company under s 466(1)(c).

[51] For completeness, s 466(1)(a) provides as follows:

> Definition of inability to pay debts.
>
> (1) A company shall be deemed to be unable to pay its debts if —
>
> (a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

[52] In the instant case, the defendant is likely, based on the notice, to pursue the winding up of the plaintiff on the basis of s 465(1)(e), and as such, relying in aid of the aforesaid statutory presumption under s 466(1)(a). A failure to pay within the stipulated period of 21 days will give rise to the statutory presumption that the plaintiff company is unable to pay its debts to all its creditors. The presumption arising from the neglect to meet the demand confers on the court the jurisdiction to grant a winding up order on the basis of s 465(1)(e) of the CA. But the presumption, as most presumptions go, is rebuttable. And it is then for the debtor company to demonstrate that it is able to pay all its debts at the material time.

[53] A neglect or a refusal to pay will justify the winding up of a company in debt. It is simply flawed logic and cannot be right that a party who claims to be solvent can defeat a winding up process by conveniently asserting that it can, but without more, refuse to pay. In my view however, what matters most under

ss 465(1)(e) and 466(1)(a) is the resulting failure to make payment following a valid demand. Thus a neglect or refusal to heed a valid demand gives rise to a presumption of insolvency on the part of the debtor and would represent a legitimate basis for the court to grant a winding up order. A neglect or refusal per se however is not determinative of the appropriateness of a winding up if, as mentioned, the debtor is able, by adducing credible evidence, to rebut the presumption of insolvency.

[54] A refusal, just like a neglect, results in non-payment which in turn triggers the statutory presumption under s 466(1)(a). The question then turns on whether the applicant can show it is not insolvent but still refuses or neglects to pay. In my view, a refusal, pure and simple, cannot validly found a basis to deny the right of a creditor to file a winding up petition against a debtor. This is the case even if the debtor is commercially solvent. If a company is solvent and indebted to a creditor, a simple refusal or neglect to pay ordinarily cannot legitimately restrain the filing of a winding up petition and is unsupportable in principle, constitutes an unwarranted departure from public policy, conflicts with common and business sense logic and certainly not tenable under the law.

[55] Otherwise a solvent company can conveniently ignore a valid notice of demand to pay its debt to the creditor, purely on the basis that the former is not insolvent. Commercial solvency is a relevant consideration; but it by itself and without more, specifically, in the absence of the debt being bone fide disputed, cannot be the excuse for not paying to the creditor a valid debt.

[56] It is therefore not open to the debtor to assert that it is able to pay the debt but chooses not to at the same time. In *Cornhill Insurance Plc v Improvement Services Ltd and others* [1986] 1 WLR 114, Harman J held that where a creditor's debt is clearly established, the creditor has the right to present a winding up petition and obtain relief even though the company was solvent. The solvency of a company would count for nothing if it persists in non-payment or that it is nevertheless not ready, willing and able to meet the demand of the creditor.

[57] Conversely, the discretion to refuse winding up could be exercised if the respondent debtor is ready, willing and able to meet the demand of the creditor. In the English Court of Appeal decision in *Imperial Hydropathic Hotel Company, Blackpool v Hampson* (1882) 23 Ch D 1 where the company was solvent and the creditor accepted the proposal to pay the debt within one month, the Court of Appeal ordered the debt to be paid within one month, in default of which 'there will be the usual winding-up order'.

[58] In my view, the concept of commercial solvency in insolvency laws, and the presumption it creates under s 466 of the CA should not be treated as

existing or operating in vacuum. It does not and should not concern itself purely with the state of the debtor's financial and cash-flow position. It should rightfully encompass the equally critical issue of the actual fulfilment of the obligation to pay the debt to the creditor.

[59] Thus, even if a debtor company could demonstrate ready availability of more than sufficient cash-flow and liquid assets as well as funds capable of paying its debts whenever they fall due, its refusal or neglect to actually make the payment available to the creditor, for any reason other than that the debt is bona fide disputed on substantial grounds or other valid bases, must still mean that the company fails to rebut the presumption of its insolvency.

[60] This would tantamount to the company not being commercially solvent and thus being unable to pay its debts for purposes of ss 465(1)(e) and 466(1)(a) of the CA. After all, such refusal or neglect to pay necessarily means the absence of payment 'to the satisfaction of the creditor' within the meaning of s 466(1)(a).

[61] The other reason why the neglect or refusal argument cannot be sustained is that a refusal is unlikely to amount to a dispute, let alone bona fide in nature and on substantial grounds. It is well established in civil courts that mere refusal to pay is not a dispute because a true dispute should be in reference not just to differences arising out of a party's refusal to do something but must relate to a controversy over some contestable matters (see the High Court decisions of VC George J, as he then was, in *ELF Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 and *KSM Insuran Bhd v Ong Ah Ba & Anor* [1986] 1 MLJ 237).

[62] However, a neglect and hence a refusal to pay the debt as demanded in the valid winding up notice could be justified if the refusal is due to the debt being bona fide disputed. As discussed earlier in this judgment, this is a well-established basis to deny a petition because it represents a direct challenge on the existence of the debt itself. In other words, the key requirement in s 466(1)(a) concerning the debt is being attacked. If the challenge is successful, the presumption does not arise, since it cannot be said that the respondent debtor has neglected to pay.

[63] After all, the demand must relate to a specified debt. As such, a company has not neglected or refused to pay the debt if the debt is disputed on substantial grounds (see *Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd* [1985] 1 MLJ 84).

Absence of evidence of commercial solvency in any event

[64] Since there is bona fide dispute on the debt, the court in its discretion may restrain the filing of a petition. This is so regardless of the state of the solvency of the applicant. But in the instant case, the plaintiff did not even seek to demonstrate that it is in any event commercially solvent.

[65] In the Court of Appeal decision in *Zalam Corporation Sdn Bhd v Dolomite Readymixed Concrete Sdn Bhd* [2011] MLJU 1552; [2011] 9 CLJ 705 it was held that the issue in relation to the solvency of a debtor was not supposed to be weighed at the stage of an injunction application, and it was appropriate to decide on the issue of the plaintiff's solvency in the winding up proceeding itself because it was a defence which could be used in such a proceeding.

[66] However, in *Tan Kok Tong*, Gopal Sri Ram JCA, delivering the judgment of the Court of Appeal had said this:

> In *Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311, Low Hop Bing J (as he then was) correctly held as follows (at p 321):
>
> > In *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] MLJU 511; [2001] 4 CLJ 722, I had the occasion to consider and determine the burden of proof cast on the plaintiff in an application for interlocutory injunction to restrain the presentation of a winding up petition, in the following words:
> >
> > > I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding up petition, the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a prima facie case and that the principle relating to the test of 'serious question to be tried' in *American Cynamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 as applied in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 is not applicable as the applications there were not applications to restrain winding up petitions or proceedings, such as in the instant case before me.
> > >
> > > Illustration of a prima facie case may be provided by necessary evidence that there is a bona fide dispute by the plaintiff in relation to the statutory demand *or that the plaintiff is solvent*.

[67] In yet another Court of Appeal decision involving an application for Fortuna injunction, *Tan Kok Tong* was referred to, and the question of commercial solvency also taken into consideration. Suriyadi JCA (as he then was) concluded the findings of the majority decision of the Court of Appeal in

Westform Far East Sdn Bhd v Connaught Heights Sdn Bhd and other appeals [2010] 3 MLJ 459 as follows:

> [40] From the totality of the evidence there was clearly a genuine dispute as to the debts in question as explained above, *let alone the insolvency of the respondent was never established adequately.* I was thus satisfied that the learned judge had exercised his discretion correctly in granting the order, not only for the ex parte, but also the inter parties applications. As said above, an appellate court will rarely interfere with an exercise of discretion unless the trial judge has erred in law or if the trial judge has failed to take into account highly relevant considerations. Here I failed to detect that error.

[68] It is worthy of emphasis that in my view, commercial solvency, whilst clearly a critical issue to be determined by the courts when assessing whether or not a winding up order ought to be granted on the basis of a notice issued under s 465(1)(e) of the Companies Act 2016 (concerning the company being unable to pay its debts) should also be a consideration at the injunction application stage, but cannot without more defeat the position of an undisputed debt.

[69] But as I have discussed, the excuse of the solvency of a judgment debtor cannot be accepted as of right to be a basis justifying the grant of an injunction preventing a judgment creditor from exercising its statutory right to present a winding up petition against the judgment debtor for the debtor's failure to pay on the winding up notice. I would think it correct in principle that as a general rule, a debtor cannot legitimately hide behind the shield of solvency to stave off threat of winding up but at the same time conveniently and unfairly refuse settlement of an undisputed debt.

[70] It is, in any event, now settled law that the issue on the inability to pay debt is to be considered in commercial context, which is the neglect to pay current demands regardless of whether the debtor is in possession of assets which, if realised would permit it to discharge its liabilities. The test of commercial insolvency simply means that the respondent company is not able to meet current debts when they fall due (see *System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd* [1999] MLJU 55; [1999] 1 AMR 1187).

[71] This is why it has been said that a company could be both insolvent but wealthy at the same time (see, for example, the Privy Council decision in *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 and the Supreme Court decision in *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313; [1992] 1 CLJ 637). It is wholly insufficient that the assets might be realisable at some future date after the debts have become due and payable (see the Supreme Court decision in *Lian Keow Sdn Bhd (in*

liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449).

[72] I also had the occasion to state this important principle in *Aeon Big (M) Sdn Bhd v SSM Management Sdn Bhd* [2017] MLJU 1824; [2017] 8 AMR 732 as follows:

> [49] In the first place it is trite law that even though a company may possess of wealth in the form of investments not presently realisable, if the company has no assets available to meet its current liabilities, the company is legally commercially insolvent and may be wound up (see the Supreme Court decision in *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313; [1992] 1 CLJ Rep 303). The test of solvency is one of cash flow solvency, not balance sheet solvency.

[73] The mere fact of the plaintiff in the instant case having filed an appeal against the judgment debt does not turn the same into one that is bona fide disputed. The judgment debt remains valid, binding and enforceable absent a stay or a set aside. Whether or not there are serious appealable issues are not relevant in a Fortuna injunction application. Indeed, the submissions of the plaintiff in respect of the argument of irreparable damage appear to be couched in the nature of the alleged existence of special circumstances that would otherwise justify a stay. But the instant application before me is not for a stay. It is for a Fortuna injunction.

[74] The plaintiff has not even averred that the defendant will not be in a position to repay the judgment debt to the plaintiff should the plaintiff succeed in its appeal. Thus this is another reason which militates against the argument that the appeal will be rendered nugatory unless a Fortuna injunction is granted.

[75] In any event, even if the petition is successful and a winding up order granted against the plaintiff, the pending appeal could still be pursued by the liquidator of the plaintiff under s 486(1)(a) read together with Part 1 of the Twelfth Schedule under the Companies Act 2016.

[76] Should the Fortuna injunction be refused, the plaintiff still retains the right to resort to other provisions of the Companies Act 2016 and the Companies Winding-up Rules 1972 to oppose the petition, when presented. In the event a winding up order is entered against the plaintiff, it can still seek to stay or altogether terminate the winding up order under ss 492 and 493 respectively. In any event, once wound up, the liquidator, who would be managing the affairs of the company may still decide to pursue the school project as the liquidator deems appropriate.

Erinford is not the correct application

[77] Another issue that needs to be addressed is the plaintiff's description of its instant application for injunction as one in the nature of an Erinford, instead of a Fortuna. As stated earlier in this judgment, the plaintiff listed out a number of cases that show the application of the Erinford injunction. That of course is not disputed but they have no relevance to the instant proceeding.

[78] An Erinford is an order granted to an applicant who has initially failed either in the main action or for an interlocutory injunction but has appealed against that decision. The court has the discretion to allow an Erinford injunction to the unsuccessful party on the dismissal of an application for an interlocutory injunction pending an appeal against the refusal.

[79] Plainly it has no application in the instant case. First, a Fortuna injunction is well established as the legal process to be invoked in the context of restraining the presentation of a winding up petition, like presently. And secondly, the jurisdiction to grant an Erinford arises after the dismissal of the initial application for injunction, pending disposal of the appeal against the dismissal. This is quite unlike the present case, where the plaintiff applied for an Erinford at first instance in the absence of any dismissal of an earlier injunction application, for there was no initial application to start with.

[80] The decision of the High Court in *Celcom (Malaysia) Bhd v Inmiss Communication Sdn Bhd* [2003] 3 MLJ 178 referred to by the plaintiff, clearly demonstrates the flaw in this instant action commenced by the plaintiff. In that case, Zulkefli J (now PCA) introduced the case as follows:

> This is the plaintiff's application (encl 22) for an Erinford injunction to restrain the defendant from taking further steps in Winding Up Petition No D3–28–1134 of 2002 ('the petition') pending the hearing of the plaintiff's appeal to the Court of Appeal *against the decision made by this court on 15 November 2002 in dismissing the plaintiff's application for an injunction to restrain the defendant from filing a winding up petition against the plaintiff (encl 3).* (Emphasis added.)

[81] In other words, again, instead of applying for an Erinford, the plaintiff should first pursue a Fortuna injunction application. Its application on the basis of the Erinford is therefore defective. In any event, regardless, at the hearing, I considered the application as if it was one of Fortuna, which in the result, I have found to be unsustainable for the reasons stated earlier.

[82] What really is the true objective of the plaintiff in making this injunction application which it characterised as an Erinford injunction? It seems apparent that the plaintiff is seeking for an injunction, Fortuna or

Erinford, to operate, for all intents and purposes, as a stay of execution of the judgment debt which the plaintiff has even failed to apply. In the eponymous case of *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448, Megarry J held as follows:

> Although the type of injunction granted is not a stay of execution, it achieves for the application or action which fails, the same sort of result as a stay of execution achieves for the application or action which succeeds.

[83] To such extent, the nature of the relief sought by the plaintiff is clearly intended to prevent the execution of the judgment debt pending the disposal of its appeal against the judgment debt. This is bordering on an abuse of court process because the plaintiff should rightfully have applied to the sessions court to stay the execution of the judgment debt pending the disposal of the appeal. Instead the plaintiff now seeks to achieve the same result by applying, erroneously, for a Fortuna injunction instead. This is thus a stay the application by the backdoor, pure and simple. And it is not acceptable and cannot be countenanced by this court.

[84] For the record, upon my refusal of the Fortuna injunction application at the conclusion of the hearing, the plaintiff did orally apply for an Erinford injunction, on the same grounds as advanced for the Fortuna injunction. I considered the request even though the counsel for the plaintiff did not indicate the plaintiff would be appealing against the dismissal of the Fortuna application. In any event I found the application to be without merit, for substantially the same reasons I dismissed the Fortuna injunction request, particularly given the finding of the absence of a bona fide dispute over the debt and especially since the assertion on the alleged negative consequences of the filing of a winding up petition on the school project was not sufficiently substantiated. As such, I also decided to dismiss the plaintiff's application for an Erinford injunction.

CONCLUSION

[85] In view of the foregoing reasons, primarily on the absence of any bona fide dispute in respect of the debt demanded in the winding up notice, such that an intended petition by the defendant would not be bound to fail, the application of the plaintiff to restrain the filing of a winding up petition by the defendant cannot be sustained. There is as such a manifest absence of any legitimate basis to deny the right of the defendant under the statute to proceed with a winding up petition against the plaintiff upon the non-payment of the statutory demand under s 465(1)(e) after 21 days, and much less to even suggest that the defendant is abusing the legal process. As such I dismiss the originating summons of the plaintiff in encl 1.

Plaintiff's application dismissed.

Reported by Dzulqarnain Ab Fatar